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FEDERAL COMMUNICATIONS COMMISSION

February 27, 1998

The Honorable William E. Kennard
 Chairman
 Federal Communications Commission
 19191 M Street N.W.
 Washington, D.C. 20554

Re: Report to Congress On Universal Service Under the Telecommunications Act of 1996,
 CC Docket No. 96-45

Dear Chairman Kennard:

I am writing to you in my capacity as President of the Information Technology Association of America. ITAA is the principal trade association of the Nation's information technology industry. Together with its twenty-five regional technology councils, ITAA represents more than 11,000 companies throughout the United States. A significant portion of these companies are enhanced service providers ("ESPs").

Recently, Senators Steven and Burns provided you with an analysis of the effect of the Telecommunications Act on the Commission's Computer II Rules, which established the distinction between regulated basic telecommunications services and non-regulated enhanced services.¹ According to this analysis, the Act replaced the Commission's deregulatory approach with a radically different regime, which would extend Title II regulation to currently unregulated service providers.

I have great respect and admiration for Senators Stevens and Burns. I also recognize the important role that they played in the adoption of the Telecommunications Act. Nonetheless, after carefully studying their letter, I must conclude that the analysis of the legislation is inconsistent with the words of the statute, is not supported by the legislative history, and would run directly counter to the deregulatory policies embodied in the Act. I am convinced that, if Congress had intended to fundamentally alter the Commission's regulatory regime -- and, for the first time, subject the highly competitive information service industry to common carrier regulation -- it would have clearly indicated its intention in the words of the legislation and in the legislative history. Congress plainly did no such thing.

¹ Letter from Senator Ted Stevens and Senator Conrad Burns to the Honorable William E. Kennard (Jan. 26, 1998) ("Letter").

The Computer II Regime

The Commission's Computer II regulatory regime has played a significant role in limiting unnecessary government regulation, providing regulatory certainty, and fostering a robust and competitive information services industry. The cornerstone of the Computer II regime is the distinction between regulated basic telecommunication service and non-regulated enhanced services. Under the Commission's Rules, basic service is limited to the provision of a "pure transmission capability over a communications path" without any "interaction with customer-supplied information."² An entity that provides basic telecommunications to the public for a fee is subject to regulation, as a common carrier, under Title II of the Communications Act. In contrast, the Commission's Computer Rules define enhanced services as:

services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing application that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.³

The Commission has repeatedly found that protocol conversion falls within the definition of an enhanced service.⁴

The Commission has concluded that entities that provide enhanced service are not subject to Title II regulation. This finding was expressly affirmed by the D.C. Circuit.⁵ The Commission also has held, under its so-called Contamination Doctrine, that when an enhanced service provider combines carrier-provided telecommunications service with protocol conversion or other enhanced services, "the entire offering is . . . considered to be enhanced."⁶ The Commission, therefore, has never sought to regulate the "telecommunications component" of an ESP's offering.

The analysis provided by Senators Stevens and Burns argues that, in adopting the Telecommunications Act, Congress radically altered the Commission's Computer II regime.

² Computer II Final Order, 77 F.C.C.2d 384, 420 (1980).

³ 47 C.F.R. § 64.702(a).

⁴ See generally Non-Accounting Safeguards Order, 11 FCC Rcd 21905, 21956-58 (1996) (summarizing Commission decisions).

⁵ See Computer and Communications Industry Association v. FCC, 693 F.2d 198, 206-14 (D.C. Cir. 1982).

⁶ Computer III Phase II Reconsideration Order, 3 FCC Rcd 1150, 1170 n.23 (1988) (emphasis added).

First, they claim that Congress shifted the boundary between regulated and non-regulated services by including protocol conversion within the definition of regulated telecommunications. Second, they assert that Congress replaced the Commission's deregulatory approach to enhanced services with a regime under which ESPs (referred to under the Act as Information Service Providers) are subject to Title II regulation to the extent that their offerings contain a telecommunications component. Consistent with these views, the Senators assert that Internet "conduit" service -- which, under existing Commission Rules, is a non-regulated enhanced service -- should now be treated as a regulated telecommunications service.

While Senators Stevens and Burns have set out their arguments with great care, their interpretation of the Telecommunications Act cannot withstand scrutiny. To the contrary, as explained below, the available evidence demonstrates that the Telecommunications Act codified the Commission's Computer II regime. The only relevant change was the decision to replace the terms "basic" and "enhanced," which are used in the Commission's Rules, with the terms "telecommunications" and "information services," which were used in the Modification of Final Judgment. Under this approach, the entities now known as Information Service Providers -- including providers of Internet conduit services -- continue to be treated as non-regulated businesses that use telecommunications in order to deliver information to their customers, rather than as providers of regulated telecommunications services.

The Telecommunications Act Did Not Extend Title II Regulation to Previously Unregulated Services

Senators Steven and Burns contend that, in adopting the Telecommunications Act, Congress "broadened" the class of services subject to Title II regulation to include protocol conversion. The regulatory status of protocol conversion is of critical importance to the information services industry. The Commission's decision to treat protocol conversion as a non-regulated offering has provided one of the primary bases for its conclusion that Internet and other information services are not subject to burdensome and unnecessary Title II regulation.

The Telecommunications Act defines "telecommunications" as the transmission of user-provided information, between user-specified points, "without change in the form or content of the information as sent and received."⁷ In their letter, Senators Stevens and Burns state that, under the statute, "[i]f the information chosen by the user has the same form (e.g. typewritten English) and content (e.g. directions to Washington) as sent and received then a 'telecommunication' has occurred." They further reason that protocol conversion is telecommunications because it does not change the "form or content" of the user's information -- it merely "enable[s] the message to be transmitted between two computer, two phones, or some combination thereof."⁸ The Senators go on to note that, unlike the Commission's definition of an enhanced service, the statutory definition of an information service does not expressly reference protocol conversion. This omission, the Senators conclude, "was not an accident. Congress recognized the fact that increasingly all communications and computer applications will invariably involve some protocol

⁷ 47 U.S.C. § 153(43).

⁸ Letter at 4.

conversion."⁹

With all due respect, this analysis is seriously flawed.

As an initial matter, treating protocol conversion as regulated telecommunications is inconsistent with the statutory language. Protocol conversion transforms user information from one "language" to another. For example, information service providers offer "gateways" that translate one electronic mail protocol to another electronic mail protocol. This enables customers that use different e-mail services -- such as Lotus Notes, MCI Mail, or America On Line's e-mail service -- to communicate with each other over the Internet. Translating user data from Lotus Notes to MCIMail is every bit as much a change in the "form" of the user's information as translating from English to French.

At the same time, protocol conversion falls squarely within the statutory definition of an information service. This offering provides a user with the "capability for . . . acquiring . . . transforming . . . retrieving, utilizing, or making available information" over the telecommunications network."¹⁰ The fact that the statutory definition of an information services does not expressly reference protocol conversion is of no consequence.

The Senators' claim that the Telecommunications Act was intended to significantly shift the boundary between regulated and non-regulated services has no basis in the legislative history of the Act. The definition of both telecommunications and information services was

⁹ Id.

¹⁰ 47 U.S.C. § 153(20).

taken, in all relevant respects, from the Modification of Final Judgement.¹¹ The definitions contained in the MFJ, in turn, were taken from an earlier Senate bill, S. 898,¹² which was introduced in order to codify the Commission's Computer II basic/enhanced dichotomy.¹³

The legislative history is silent as to why Congress chose to use the definitions in the MFJ, rather than those in the Commission's Rules. However, at the time it enacted the Telecommunications Act, Congress was no doubt aware that both the FCC and the Bell Operating Companies had repeatedly taken the position that the MFJ's telecommunications/information services dichotomy tracked the FCC's basic/enhanced dichotomy.¹⁴ The most reasonable inference is that Congress chose to use the terms contained in the MFJ for administrative simplicity, because a significant purpose of the Act was to transfer administration

¹¹ Compare 47 U.S.C §§ 153(20) & 153(43) with United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 229 (D.D.C. 1982) (Sections IV.J and IV.O of the MFJ). The House bill included definitions of both telecommunications and information service that were taken, almost verbatim, from "the definitions contained in the Modification of Final Judgement." H. Rpt. 104-204, 104th Cong. 1st Sess., 125 ("House Report"). While Congress adopted the House definition of information services, the Act uses the Senate's definition of telecommunications. Although there are some differences in the definition of telecommunications in the two bills, the Senate bill does not fundamentally depart from the MFJ-based language adopted by the House. Compare H.R. 1555 § 501(a)(48) ("The term 'telecommunications' means the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, switching, and delivery of such information) essential to such transmission.") with S. 652 § 8(b) ("'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, including voice, data, image, graphics, and video, without change in the form or content of the information, as sent and received, with or without benefit of any closed transmission medium.").

¹² S. 898 § 103(19), 97th Cong., 1st Sess. (1981).

¹³ See S. Rep. No. 97-170, 97th Cong., 1st Sess., at 4 & 24 (1981).

¹⁴ See, e.g., Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, 2633 (1988) (Computer I and MFJ categories are "substantially equivalent"); Reply of Bell Operating Companies in Support of Their Motion for a Limited Waiver of the Interexchange Restriction to Permit Them to Provide Information Services Across LATA Boundaries (Feb. 2, 1994) (Information and enhanced service "are, as a general matter, the same."); see also U.S. Department of Justice, The Geodesic Network 6.1 (1987) ("The MFJ's lines roughly track the FCC's Computer II lines between 'basic' and 'enhanced' services.").

of the MFJ from the Decree Court to the Commission.¹⁵

In any case, Congress' decision to adopt the terminology used in the MFJ, rather than the FCC's rules, has no effect on the regulatory status of protocol conversion. On several occasions, Judge Greene made clear that, as used in the Decree, the term information services included protocol conversion.¹⁶ Had Congress intended to depart from the conclusion reached by both the Commission and the Decree Court, it plainly would have made this intention clear. In the absence of any evidence to the contrary -- either in the words of the statute or the legislative history -- the most reasonable inference is that Congress intended to preserve the non-regulated status of protocol conversion.

Finally, the suggestion that Congress intended to extend Title II regulation to protocol conversion is flatly inconsistent with the deregulatory policy of the Telecommunications Act. Indeed, because the classification of protocol conversion as a telecommunications service could result in the regulation of Internet access services, it is inconsistent with the established congressional policy that "the Internet and other interactive computer services" should remain "unfettered by Federal or State regulation."¹⁷

Congress Did Not Intend to Regulate Information Service Providers as Telecommunications Carriers

The Commission has long held that an entity that combines carrier-provided transmission service with computer processing applications is providing a single, integrated, non-regulated offering. The Commission has sometimes described this as a situation in which the enhanced component of the entity's offering "contaminates" the basic component, rendering the entire offering non-regulated.¹⁸ However articulated, the Commission's position has been clear and consistent: An entity that purchases telecommunications capacity from a common carrier and

¹⁵ See 47 U.S.C. 601.

¹⁶ See Information Services Reconsideration Order, 690 F.Supp. 22, 27-28 (D.D.C. 1988); Information Services Order, 714 F.Supp. 1, 16-17 (D.D.C. 1988); Triennial Review Order, 673 F. Supp. 525, 593-94 (D.D.C. 1987); see also The Geodesic Network, *supra*, a 6.3 (The prohibition on the BOCs "transforming" or "processing" information prohibited them from "reformatting an electronic message delivered from one electronic device into a format understandable by another [packetizing and protocol conversion.]"); S. Rpt. No. 97-170 (The definition of an information service, subsequently incorporated into the MFJ, includes "any service which . . . delivers information in a code or protocol different from that in which it was received from a user.).

¹⁷ 47 U.S.C. § 230(b).

¹⁸ See Computer III Phase II Reconsideration Order, 3 FCC Rcd 1150, 1170 n.23 (1988); Computer III Phase II Order, 2 FCC Rcd 3072, 3075-78 (1987).

then combines that capacity with computer processing applications to provide a value-added service is a non-regulated user of communications, not a regulated provider of telecommunications service.

Senators Stevens and Burns contend that, by incorporating the term "telecommunications carrier" into the Telecommunications Act, Congress meant to radically alter the Commission's regulatory approach. In their view, an ISP provides a "hybrid service" that contains two distinct elements: information services and telecommunications. To the extent that an ISP provides telecommunications, they reason, it is a telecommunications carrier and, therefore, is subject to Title II regulation. ISPs, they add, cannot escape Title II regulation by "bundling . . . telecommunications and information service in a single package sold for a fee to the public."¹⁹

Here, again, I must respectfully disagree.

Contrary to the Senators' assertion, information service providers do not offer a "hybrid service."²⁰ Indeed, the term hybrid services does not appear in either the text of the Act or the legislative history.²¹ Rather, the statute makes clear that an entity that provides an

¹⁹ Letter at 5.

²⁰ Rather, ISPs combine basic telecommunications with computer processing applications to create a single, integrated, non-regulated offering. This is fundamentally different from the situation in which an entity bundles a telecommunications service with an information service and sells the package to its customers at a single price. As the Commission just recently reiterated, if an ISP provides "two separate and distinct services" (such as voice-grade telephony and electronic mail service) to the public for a fee, its basic service is subject to Title II regulation. Universal Service Fourth Reconsideration Order, CC Docket 96-45, ¶ 282 (rel. Dec. 30, 1997).

²¹ The term of a "hybrid service" is taken from the Commission's Computer I rules, which were in effect during the 1970s. Under those rules, services were divided into three categories: telecommunications, data processing, and hybrid services. Under this approach, telecommunications services were subject to Title II regulation, while data processing was not. Hybrid services were those deemed to involve both telecommunications and data processing. Even then, however, the Commission recognized that a given offering could not be regulated as both telecommunications and data processing. Rather, the Commission determined the regulatory status of a given offering based on whether the telecommunications or data processing component "predominated." See Computer I Final Order, 28 F.C.C.2d 267, 287-88 (1971). In Computer II, the Commission recognized that -- as a result of rapidly change technology -- determining the regulatory status of a given offering on a case-by-case basis was not feasible. The Commission therefore adopted the current basic/enhanced dichotomy, under which enhanced services are not subject to any form of Title II regulation. See Computer II Final Order, 77 F.C.C.2d at 394, 417-30 (1980).

information service is "offering . . . a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."²² While that capability is made available "via telecommunications,"²³ this does not make an ISP a telecommunications carrier. Rather, under the express terms of the statute, an entity is only a telecommunications carrier if it "provide[s] telecommunications for a fee directly to the public."²⁴ "Information Service Providers," as the Senate Committee Report explained, "do not 'provide' telecommunications services; they are users of telecommunications services."²⁵ Consequently, ISPs are not subject to regulation as telecommunications carriers.²⁶

The legislative history refutes the contention that Congress adopted the term telecommunications carrier in order to over-turn the Commission's Computer II regulatory regime. Not a single word in the legislative history suggests that Congress was dissatisfied with the Commission's long-standing approach, or that it intended to extend Title II regulation to ISPs. To the contrary, the Senate Report makes clear that Congress added the term telecommunications carrier for a far more modest purpose. The Communications Act of 1934, as originally enacted, defined a "carrier" as a common carrier. In more recent years, however, the courts have come to recognize that a carrier "can be a common carrier with respect to some activities but not others."²⁷ By adding the term telecommunications carrier, Congress merely sought to "amend[] the 1934 Act to explicitly provide that a 'telecommunications carrier' shall be treated as a common carrier for purposes of the act, but only to the extent that it is engaged in providing telecommunications services."²⁸

(..continued)

Today's information service market, of course, is far more complex and fast-changing than that of the 1970s. The Senators, however, do not indicate how the Commission will be able to determine, for any given service, what portion is telecommunications, and how it will limit its imposition of regulation to that component.

²² 47 U.S.C. § 153(20).

²³ Id.

²⁴ 47 U.S.C. § 153(44) & (46).

²⁵ S. Rpt. 104-23, 104th Cong, 1st Sess., at 28 ("Senate Report").

²⁶ Further evidence that Congress did not intend for ISPs to be treated as telecommunications carriers comes from the fact that, in several places, the legislation clearly distinguishes telecommunications and information services. See, e.g., 47 U.S.C. § 254(h)(2) (Commission to promote access to both "Advanced telecommunications and information services").

²⁷ NARUC II, 533 F.2d 601, 608 (D.C. Cir. 1976).

²⁸ Senate Report at 18; see House Report at 126 (definitions intended to codify "the distinction between common carrier offerings . . . and private services"). The legislative history also provides no support for the Senators' claim that Congress added the "forbearance" provision, 47 U.S.C. § 160, in order to give the Commission the

Senators Stevens and Burns seek to counter both the plain language of the statute, and the legislative history, by relying on a few isolated words in the statutory text. They point out that the statute defines a telecommunications carrier as "any provider" of telecommunications services "regardless of the facilities used."²⁹ This language, the Senators apparently believe, means that an ISP that uses a common carrier's facilities to transport information is, itself, a provider of telecommunications services. There is no support in the legislative history for this view. Rather, the Senate Committee Report makes clear that these phrases were incorporated in the statutory definition to cover entities, other than incumbent wireline carriers, that provide telecommunications services -- such as "commercial mobile services, competitive access services, and alternative local telecommunications services" that are offered to the public.³⁰

Finally, the Senators seek to support their position by emphasizing what Congress did not say. Thus, they note the Act does not include a definition of "information service providers." This, they claim, "reflects the fact that Congress did not want to create separate class of communications providers."³¹ The Senators also point out that language "that specifically stated that a telecommunications service did not include an information service was struck before the final definitions were adopted."³² The Senators, however, do not -- and cannot -- cite to a single word in the legislative history that supports their theory that these omissions were intended to effect a radical change in the regulatory regime applicable to information service providers. A far more plausible explanation is that Congress saw no need to state, expressly, what most observers believe is obvious: entities that provide information service are information service providers; information services are not telecommunications services; and, therefore, information service providers are not telecommunications carriers.

Internet Conduit Services are Information Services, Not Regulated Telecommunications

Senators Stevens and Burns devote a substantial portion of their letter to the question of whether Internet "conduit" services fall within the definition of a regulated telecommunications service. They make four distinct arguments in support of their conclusion (...continued)

"flexibility" to exempt information service providers from Title II regulation. See Letter at 3. Rather, Congress adopted the forbearance provision in order to over-turn the decision of the Supreme Court in MCI Telecommunications Corp. V. AT&T, 512 U.S. 218 (1994), which had held that the Commission lacked the statutory to forebear from applying Title II regulation to common carriers.

²⁹ Letter at 5.

³⁰ Senate Report at 18.

³¹ Letter at 5 n.19.

³² Id. at 5.

that Internet conduit services fall within this definition. Once again, I am constrained to disagree with the Senators' conclusions.

Statutory definitions. The Senators first argue that the three components of an Internet conduit service identified by the Commission – information transmission service, information gateways (including protocol conversion), and electronic mail – are telecommunications services within the meaning of the Act.³³ While information transmission plainly is a telecommunications service, the other two elements of the offering fall squarely within the definition of an information service.

Gateway services. The concept of a "gateway service" originated in the Decree Court's Information Services Order. In that Order, Judge Greene partially lifted the prohibition on BOC provision of information services – thereby allowing the BOCs to provide gateway services that would allow their customers to access content created by others.³⁴ In adopting the Telecommunications Act, Congress "borrowed" the gateway concept to distinguish electronic publishing service, in which the provider creates the content, from non-content-based information services.³⁵ The Commission, in turn, borrowed the statutory approach in order to limit the category of Internet access services to be funded by universal service to those in which the operators does not provide its own content.³⁶ Whatever the context, however, the basic principle has remained the same: the provision of an information gateway is a non-regulated information service.

Electronic mail. Senators Stevens and Burns argue that electronic mail is telecommunications because it is nothing more than a "paperless fax."³⁷ I cannot agree. An entity that provides a basic fax service simply transports user information, in real-time, from one location to another. In contrast, an entity that provides e-mail service offers its customers access to an "electronic mailbox." This allows the sender's information to be stored until the recipient chooses to retrieve it. At that time, the service provider can enable the recipient to reply to the sender, archive the message, or forward it to additional parties. These services do not constitute the "transmission" of user information and, therefore, do not come within the statutory definition

³³ See Letter at 6-7.

³⁴ See Information Services Order, 714 F.Supp. at 13-22.

³⁵ See 47 U.S.C. § 274(h)(2). The Senators provide no basis for their contention that gateway services were excluded from the statutory definition of electronic publishing "because they are telecommunications services." Letter at 7. Indeed, if gateway services were telecommunications services, there would have been no need for Congress to exclude them from the definition of electronic publishing, which is an information service.

³⁶ See Universal Service Order, CC Docket 97-157, ¶ 444 (rel. May 8, 1997).

³⁷ Letter at 7.

of a telecommunications service.³⁸ Rather, as Judge Greene concluded at the time the MFJ was adopted, electronic mail constitutes an information service.³⁹

Deployment of Internet services. The Senators next suggest that Internet conduit service should be classified as a telecommunications service because, if it is not, the provision of this service to residential consumers "can never be supported as part of universal service."⁴⁰ I share the Senators' concern about the need to ensure widespread deployment, at affordable prices, of Internet access service -- especially in rural, high cost, and other historically underserved areas. I regret to say, however, that I cannot support their proposed solution.

Congress made clear that the general universal service program was to be limited to telecommunications services.⁴¹ As a result, Internet access cannot be included in the services eligible for the general universal service subsidy. The proper recourse for those who disagree with this decision is to ask Congress to amend the Telecommunications Act to allow the Commission to subsidize information services -- not to ask the Commission to alter its rules to classify Internet conduit service as telecommunications.

Preservation of universal service. The Senators next suggest that the current regulatory treatment of information services, including Internet conduit service, threatens to cause the "collapse" of the universal service system by depriving the local exchange carriers ("LECs") of adequate revenues to cover costs.⁴² This assertion is based on three assumptions. The first assumption is that, as a result of the Commission's access charge rules, that ISPs do not adequately compensate the LECs for the costs they impose on the network. The second is that the ISPs are not contributing to universal service. And the final assumption is that significant amount of voice traffic is migrating from the PSTN to the Internet, thereby eroding the universal service funding base. The record makes clear that none of these assumptions is correct.

First, ISPs do pay their fair share of the cost of the local networks. This proceeding is not the appropriate forum to debate -- yet again -- the question of whether ISPs should be required to pay the same access charges at interexchange carriers. In the Access

³⁸ E-mail service, moreover, involves protocol conversion -- which, as demonstrated above, is an information service.

³⁹ See Information Services Reconsideration Order, 690 F.Supp. at 27 (BOCs allowed to provide electronic mail service "as an exception to the general ban" on BOC provision of information services).

⁴⁰ Letter at 7.

⁴¹ See 47 U.S.C. § 254(c)(1) ("universal service is an evolving level of telecommunications services . . ."). Indeed, the program is to cover only those telecommunications services found to be "essential" and "subscribed to by a substantial majority of residential consumer." Id. at § 254(c)(1).

⁴² Letter at 7-9.

Charge Order, the Commission concluded that they should not.⁴³ In reaching that conclusion, the Commission specifically held that the growth of information service traffic has not imposed "uncompensated costs" on the ILECs.⁴⁴

Second, while information service providers generally are not required to make direct payments to the Universal Service Fund, they make significant contributions to the advancement of universal service.⁴⁵ ISPs make heavy use of telecommunications services. Indeed, for many ISPs, payments to telecommunications carriers is the single largest cost of doing business. The rates that ISPs pay to their carriers include the payments that these carriers must make to the Universal Service Fund.⁴⁶

Finally, the record does not contain a shred of evidence to support the proposition that a significant amount of voice traffic has migrated from the Public Switched Telephone Network to the Internet. To the contrary, the available evidence indicates that Internet telephony

⁴³ See Access Charge Order, CC Docket No. 97-158, ¶¶ 344-48 (rel. May 16, 1997). ITAA was pleased to join with the Commission to defend this decision before the Eighth Circuit.

⁴⁴ Id. at ¶ 347. Indeed, evidence in the record in the Access Charge proceeding indicates that the increase in LEC revenues resulting from the growth of information services exceeds the growth in LEC costs attributable to these services by a factor of six-to-one. See Economics and Technology, Inc., The Effect of Internet Use on the Nation's Telephone Network, at 25-29 (Jan. 22, 1997). This study was submitted by the Internet Access Coalition, which I co-chair. Requiring ISPs to pay carrier access charges would simply force ISPs to pay the same economically inefficient, above-cost rates as interexchange carriers. The Commission's goal should be to eliminate of implicit subsidies that remain in the carrier access charge regime, not to extend them to additional entities.

⁴⁵ Contrary to the suggestion made by some observers, requiring carriers to pay into the USF, while generally not requiring ISPs to do so, does not raise any question of competitive neutrality. Under the Commission's Rules, no entity -- whether carrier or non-carrier, is required to make direct payments to the USF based on revenues generated through the provision of information services.

⁴⁶ ISPs also continue to contribute to the implicit subsidies that remain in the Commission's regulatory regime. For example, the Commission's new Access Charge rules continue to heavily subsidize the interstate component of residential local loop costs. This subsidy is funded by requiring interexchange carriers ("IXCs") to pay local exchange carriers both a flat-rate Presubscribed Interexchange Carrier Charge and a per-minute Common Carrier Line Charge. These costs, in turn, are passed on to the IXCs' customers. Large business customers -- such as ISPs -- continue to pay a disproportionate share of the cost of these subsidies.

constitutes only a minuscule portion of all information service traffic.⁴⁷ The volume of Internet telephony traffic may well grow significantly in the coming years. If it does, the Commission -- and, if necessary, Congress -- can take appropriate action to address the regulatory issues that this offering presents. At the present time, however, the appearance of this innovative new service provides no justification for the Commission to abandon its well-established, deregulatory, and highly successful regulatory regime.⁴⁸

School Internet program. Finally, the Senators argue that the Commission should classify Internet conduit services as telecommunications in order to avoid the "strained" reading of Section 254, which allows for USF revenues to be used to provide Internet conduit service to schools and libraries, even though this offering is an information service.⁴⁹

To be candid, ITAA had some initial doubts about the legality of using USF revenue to subsidize Internet access service -- which, as demonstrated above, is an information service -- for schools and libraries. For that reason, the Association initially proposed that the Commission limit its funding, under Section 254(h)(2), to advanced telecommunications services that schools and libraries could use to access the Internet and other on-line services.⁵⁰ We are

⁴⁷ Indeed, at its recent En Banc Hearing, the Commission heard expert testimony that described Internet telephony as "ham radio for the PC," "a hobby," and "predictably unpredictable." Testimony of Jeff Pulver, President, Pulver.com.

⁴⁸ Rather than viewing Internet telephony as a regulatory "problem," the Commission has recognized that the arrival of this service is a significant opportunity. See, e.g., International Settlements Rate Order, IB Docket No. 96-261, ¶ 11 (Aug. 18, 1997) ("Internet telephony has the potential to be a significant alternative to the accounting rate system. . . . [W]e anticipate that charges for internet telephony will be substantially closer to the actual cost of providing service, and much lower than most collection rates for international service.")

⁴⁹ See Letter at 10-12.

⁵⁰ See Joint Reply Comments of the Information Technology Association of America, the Information Technology Industry Council, the Information Industry Association, and the National Retail Foundation, CC Docket No. 96-45, at 5-9 (filed May 7, 1996).

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now convinced, however, that the agency has acted within the scope of its statutory authority.⁵¹ If the Commission has any doubt about the legality of its prior decision, however, the correct approach is to restrict the schools and libraries program to services that indisputably are telecommunications, such as T-1 access to the Internet – not to reclassify Internet conduit service as regulated telecommunications.

In closing, I want to commend Senators Stevens and Burns for making an important contribution to the debate by clearly articulating their interpretation of the Act. Because of the Senators' expertise, their letter deserves careful consideration. Ultimately, however, their views – no matter how strongly held or well-intentioned – cannot trump the language and the legislative history of the Telecommunications Act. Review of these materials demonstrates conclusively that, when Congress adopted the Telecommunications Act, it intended

⁵¹ In particular, we note that the Conference Committee Report states that, pursuant to section 254(h)(2), the Commission may take actions to "enhance the availability of telecommunications and information services" to schools and libraries. Conf. Rpt. 104-458, 104th Cong., 2d Sess., at 133 (Jan. 31, 1996) (emphasis added). Pursuant to Section 254(h)(2), however, such a program must be "competitively neutral." As the Commission has correctly recognized, this means that all providers of Internet conduit services – not just those providers affiliated with a common carrier – must have an equal opportunity to compete to provide this service to eligible institutions in the most cost-effective manner.

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to promote competition and eliminate needless regulation -- not to regulate the information services industry.

Sincerely, .



Harris N. Miller
President
Information Technology Association of America

cc: Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani
A. Richard Metzger
Magalie Roman Salas

cc: Senator Ted Stevens
Senator Conrad Burns
Senator John McCain
Senator Ernest Hollings